No. 379

AUG 27 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

W. S. SIMMONS, (Rosa F. Simmons, Temporary Administratrix Substituted in place of W. S. Simmons, deceased), Appellant,

versus

PEAVY-WELSH LUMBER COMPANY, Appellee.

Petition to the Supreme Court of the United States for a Writ of Certiorari to review a judgment of the United States Circuit Court of Appeals, Fifth Circuit.

EDGAR J. OLIVER,
DUNBAR HARRISON,
Attorneys for Petitioner,
Savannah, Ga.

REVIEW PTG. CO., SAVANNAH, GA.

INDEX

	Page
Petition for Certiorari	1
Jurisdiction	1
Statement	1, 2
Specification of Errors	2, 3
Reasons for Granting the Writ	3, 4, 5, 6
Rules for Civil Procedure 7, 8, and 12	2
Rules for Civil Procedure 7(c), 8(a), (e), 1 and 2	3, 4
Rules for Civil Procedure 8(f)	4
Rules for Civil Procedure 12 (b)	4
Supporting Brief	8
Rule United States Supreme Court 38-5 (b)	9

CASES CITED

Beck vs. Thompson, 108 Ga. 242	6
Doonan vs. Ives, 73 Ga. 295	6
Gresham vs. Connally, 114 Ga. 906	6
Herman vs. Mutual Life Insurance Company, 108 Federal 2nd 678	5, 10
Hill vs. Balkin, 79 Ga. 444	6
Land Company of Florida vs. Fetty, 15 Federal 2nd 942	8
Leimer vs. State Mutual Assurance Society, 108 Fed. 2nd 302	5
McDonald vs. Capaniss, 100 Tex. 615	6
Ware vs. Reese, 59 Ga. 588	6
Sierocynski vs. DuPont, 103 Fed. 2nd 843	5, 10

Supreme Court of the United States

W. S. SIMMONS, (Rosa F. Simmons, Temporary Administratrix Substituted in place of W. S. Simmons, deceased),
Appellant,

versus

PEAVY-WELSH LUMBER COMPANY,
Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The plaintiff prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the above case on June 17, 1940 (R-102), a rehearing having been denied July 23, 1940 (R-115), sustaining a judgment of the District Court of the United States for the Southern District of Georgia, dismissing the petition.

JURISDICTION.

Jurisdiction is invoked under Section 240 of the Judicial Code as amended. U. S. C. A. 28-347.

STATEMENT.

The original petition is in two counts, the first seeking recovery on an express contract, written and oral, (R-76 Pars. 8 through 11); the second count seeking recovery on a Quantum Meruit (R-78-80). The amended petition (R-74, R-85) alleges that the Defendant agreed to pay the Plaintiff a commission of

3%, if the Plaintiff would furnish to Defendant the name of a purchaser for its lands and timber with whom the Defendant might make a satisfactory deal. All the Plaintiff had to do under the agreement was to furnish the name of the prospect and the Defendant would close the deal. (R-75, Pars. 6 through 11.) The contract first contemplated a sale by Defendant of all of its lands and timber, involving more than a million dollars. Subsequently, the contract was modified to permit sales in parcels.

The second count on a Quantum Meruit alleges that services were rendered by Plaintiff to Defendant with its knowledge and consent, of which Defendant took full benefit, knowing that Plaintiff was working with the understanding that compensation would be due upon completion by the Defendant of a sale to any prospect furnished by Plaintiff.

Plaintiff sought a recovery of $33,000.00.

The District Judge sustained the Defendant's motion to dismiss the petition. (R-90) The Appellate Court sustained the District Court on June 17, 1940 (R-102), in a divided opinion, Judge Hutcheson dissenting (R-105). The Appellate Court denied Plaintiff's Petition for a rehearing on July 23, 1940 (R-115), Justice Hutcheson still dissenting.

SPECIFICATIONS OF ERRORS.

The Circuit Court of Appeals erred:

I. In deciding an important question of Federal Procedure under Rules 7, 8, and 12 of the Rules of Federal Procedure, which has not been, but should be settled by this Court.

II. In failing to construe and apply Rule 8f: "All pleadings should be so construed as to do substantial justice," according to its true intent and contrary to the construction followed in other circuits of the Federal Courts.

III. In departing from the accepted and usual course of judicial procedure, sanctioned by both State and Federal Courts, in that it has undertaken to decide a question of fact upon a motion to dismiss, and denied to the Plaintiff the right to prove his case before a jury.

IV. The errors specified are such a departure from accepted and usual judicial procedure, as to call for an exercise of this Court's power of supervision.

REASONS FOR GRANTING THE WRIT.

I.

The writ should be granted because the Circuit Court of Appeals has decided an important question of Federal Procedure arising under Rules 7c, 8, a, e, f, and 12 (b) 6.

Rule 7(c) "Demurrers, pleas, etc. abolished. Demurrers, pleas and exceptions for insufficiency of a pleading shall not be used."

Rule 8(a) **"Claims for Relief.** A pleading which sets forth a claim for relief . . . shall contain (1) Jurisdictional averments, (2) A short and plain statement of the claim showing that the pleader is entitled to relief, and (3) A demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded."

(e) **"Pleading To Be Concise and Direct; Consistency.**

"(1) Each averment of a pleading shall be simple concise, and direct. No technical forms of pleading or motions are required.

"(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11."

"(f) **Construction of Pleadings.** All pleadings shall be so construed as to do substantial justice."

Rule 12(b) "The following defenses may at the option of the Pleader be made on motion: (6) Failure to state a claim upon which relief can be granted."

The Appellate Court did not apply these rules according to the intent and purpose for which they are made. To quote from Judge Hutcheson's dissenting opinion: "The new rules are designed to secure precision and dispatch. They are not designed, they may not be used to permit a trial Court on a motion to dismiss to decide the case on its merits and thus to deprive a litigant of his right to prove the facts on which he relies. The majortity opinion naively speaks of this novel procedure as the direct way in which the District Court went to the heart of the case. The difficulty of this direct method employed by a District Judge and approved by the majority is that it undertook to decide

the case entirely on the written exhibits, and thereby deprived Plaintiff of the right to prove the oral contract he had specifically alleged."

In undertaking to decide the case on its merits, the Appellate Court did not give proper consideration and application to the manifest purpose and intent of the new rules. And in dismissing the case under Rule 12b (6), upon a motion to dismiss, the Court has established a precedent which deprives the Plaintiff of his right to prove his case, either upon the written contract or upon the oral contract expressly alleged, or upon the Count seeking recovery upon a Quantum Meruit, which would entitle the Plaintiff to recover if the Defendant, with knowledge, permitted the Plaintiff to work in its behalf, accepted the benefits of his work, took the customers presented by the Plaintiff, sold the land to them, and fraudently declined to pay the Plaintiff for services which the Defendant had approved and accepted.

II and III.

The Appellate Court has misinterpreted and misapplied The Rule of Federal Procedure: "All pleadings shall be so construed as to do substantial justice." It is the Court's duty to construe the pleadings in Plaintiff's favor. If the Plaintiff would be entitled to relief under any state of facts which could be proved in support of the claim, the petition should not be dismissed. This interpretation and application of the rule has been established in other circuits.

Herman vs. Mutual Life Insurance Company, 108 Federal 2nd 678;

Leimer vs. State Mutual Assurance Society, 108 Federal 2nd 302;

Sierocynski vs. DuPont, 103 Federal 2nd 843.

In failing to follow this rule, the Appellate Court erred. Under the rule, a jury could have found, that the letter of February 3rd, 1936 (R-71, 92), upon which the Appellate Court based its Judgments of June 17th (R-102) and 23rd (R-115) was the Defendant's effort to terminate a contract already existing, that the Defendant did not intend to assert that there never had been a contract, but was trying to break the contract, and that after the letter, the Plaintiff with Defendant's knowledge rendered service, produced two customers, whom the Defendant accepted and to whom it sold its property, at which time Plaintiff's commission became due. Any one or all of these three theories, the Plaintiff could have proven, and upon such proof would have been entitled to recover. Upon the manifest misapplication of the rule by the majority of the Court, Judge Hutcheson says:

"In addition, the majority opinion wholly overlooks plaintiff's suit on a quantum meruit which charges that the defendant availed itself of petitioner's services and thereby sold part of the property, and that the value of petitioner's services was the amount sued for.

"On such allegations it is plain that a recovery may be had if the proof supports them. McDonald v. Capaniss, 100 Tex. 615; Doonan vs. Ives, 73 Ga. 295; Gresham v. Connally, 114 Ga. 906; Ware v. Reese, 59 Ga. 588; Hill v. Balkin, 79 Ga. 444; Beck v. Thompson, 108 Ga. 242."

Judge Hutcheson concludes his dissenting opinion in these words: "If plaintiff could prove the oral contract, he could recover on it, and if he could not, but could prove the facts he alleged in the second count, he could recover on a quantum meruit. It is quite plain then, that in disposing of the case as on the

merits without giving plaintiff an opportunity by proof to put the merits before the court, **both procedurally and as a matter of substance, the judgment was wrong.** (Italics ours.) I respectfully dissent from its affirmance."

IV.

The errors specified above are of gravity, importance and substance. The decision establishes a dangerous and improper precedent under the Federal Rules. It is a departure from the accustomed and usual course of judicial procedure. If followed it deprives all Plaintiffs in Federal Courts of a right to trial by a jury.

"Both procedurally and as a matter of substance the judgment is wrong" and should be reversed.

WHEREFORE Petitioner prays that the Court grant a writ of certiorari.

Respectfully submitted,

EDGAR J. OLIVER,
DUNBAR HARRISON,
Attorneys for Plaintiff in Certiorari,
Savannah, Ga.

SUPPORTING BRIEF.

Little can be added to the petition for certiorari. The majority opinion seems to manifest a desire to punish the Plaintiff because the petition in the Lower Court was unquestionably long. But dismissal is not the penalty for a petition too long and too "prolix."

The majority committed a substantial error in failing properly to construe and apply the rules according to the plain purpose and intent for which they are made. If the rules are properly construed and applied, the Plaintiff should be permitted to prove the definite allegations of the petition alleging an oral and a written contract to pay a 3% commission if Petitioner furnished a prospect with whom the Defendant made a deal under terms and conditions satisfactory to the parties. (R-75 Pars. 6, 7, 8, 9, 10, 11.) In declining to permit the Plaintiff to present such proof of an oral or written contract, the majority disregarded its own prior opinion in Land Company of Florida vs. Fetty, 15 Fed. 2nd 942, where on a most indefinite verbal agreement, the Plaintiff's petition was sustained, and upon the most indefinite evidence of such agreement Page 944 (5) a substantial recovery was sustained.

Also the majority ignored and swept aside those decisions of the Supreme Court of Georgia cited in Judge Hutcheson's dissent, Supra P. 6, that if the Plaintiff should prove under the count based on a Quantum Meruit that the Defendant availed itself of Petitioner's services, sold part of the property, and fraudently declined to pay the value of his services, (R-78, 80 Pars. 7 through 12), he would be entitled to recover. These Georgia authorities definitely establish this rule, and bring this case within the Rule 38, 5 (b) of the Federal Supreme Court, that the Court will re-

view on certiorari a decision in conflict with local applicable decisions. Rule 38, 5 (b):

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.
>
> (b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

The Appellate Court failed to apply according to their purpose and intent, the Federal Rules of Civil Procedure, in dismissing the petition upon the theory that the letter of February 3rd, 1936, disproved Plaintiff's case. In so doing the Appellate Court decided a question of fact upon a motion to dismiss, thereby de-

parting from the usual course of Judicial procedure, established in all Courts, State and Federal.

The Courts must construe the pleadings so as to do substantial justice, **and do so in Plaintiff's favor.** Herman vs. Mutual Life Insurance Company, 108 Fed. 2nd 678.

The majority holds that the letter disproves Plaintiff's claim. Thus the Court decides a question of fact which should be left to a jury. The letter does not disprove the case. If the letter was subject to only one possible construction in the light of the circumstances it might disprove Plaintiff's case; **but if under any state of facts which the Plaintiff could prove** the Plaintiff could recover, the petition should not be dismissed.

> "A complaint should not be dismissed for insufficiency of statement except where it appears to a certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim, in view of means afforded defendant under Civil Procedure Rules to obtain speedy disposition of claim which is without foundation or substance. Rules of Civil Procedure for District Courts, rules 8 (a) (2, 3), 12 (b) (6), 12 (e), (h) (1), 56, 28 U. S. C. A. following section 723c."
>
> Leimer, Supra 303 (8) and 306 (8) and citations. See also Sierocynski vs. E. I. Dupont, etc., 103 Fed. (2nd) 843.

A jury could find that the letter of February 3rd was merely the Defendant's self-serving declaration written designedly in anticipation of a lawsuit; or that the Defendant was making an effort to avoid a contract already existing; or that the Defendant did not intend

to assert that there never had been a contract, but that it was trying to break a contract admittedly existing. If a jury could have found any of these facts the letter did not disprove the case, and the Plaintiff could recover.

But the principal fact upon which a jury could have found for the Plaintiff was that after the letter of February 3rd, the Plaintiff continued his services for seven months, the Defendant accepted them, and received the benefits of such service.

We therefore respectfully submit that the majority has decided wrongly an important question of Federal Procedure which should be corrected by this Court, that it has misinterpreted and misapplied the Rules of Federal Procedure and has departed from the accepted and usual course of judicial procedure followed by all State and Federal Courts. If the majority opinion becomes a precedent under the Federal Rules, the right of trial by jury in District Courts will be abolished.

Respectfully submitted,

EDGAR J. OLIVER,
DUNBAR HARRISON,
Attorneys for Petitioner,
Savannah, Ga.